17

The meaning of 'investment' in the ICSID Convention

BARTON LEGUM AND CALINE MOUAWAD

The term 'investment' is a gateway that limits access to the dispute resolution mechanism established by the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the 'ICSID Convention').[1] If the term has a narrow and precise meaning, then a number of disputes that the parties have agreed to submit to ICSID may have no forum for resolution. If the term has a broad and flexible meaning, then the ICSID system will be poised to accept most, if not all, of the cases that the parties have consented to submit to ICSID arbitration.

A concrete example serves to illustrate the issue. A company organised under the law of an ICSID Contracting State holds a demand account with a bank in another Contracting State. A bilateral investment treaty is in force between the two countries that provides only for ICSID arbitration of disputes between investors and a State. The host country seizes the funds credited to the company's bank account without any offer of compensation.

Under the definition used in many investment treaties, the funds credited to the bank account could qualify as an 'investment' covered

[1] E.g. E. Gaillard, '"Biwater", Classic Investment Bases. Input, Risk, Duration', *New York Law Journal*, 240, 31 December 2008; S. Manciaux, 'La compétence matérielle. Actualité de la notion d'investissement international', paper submitted to the Colloquium on La Procédure arbitrale relative aux investissements internationaux. Aspects récents (Institut des Hautes Études Internationales Université Panthéon-Assas (Paris II), 3 April 2008; D. Krishan, 'A Notion of ICSID Investment', in T. J. Grierson Weiler (ed.), *Investment Treaty Arbitration and International Law* (New York: Juris Publishing, 2008), 61–84; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press, 2007), 164; M. Waibel, 'Opening Pandora's Box. Sovereign Bonds in International Arbitration', *AJIL*, 101 (2007), 711–59, 722–32.

by the treaty. The credit is an asset of the company in the territory of the host country, a right conferred by the account agreement with the bank and a claim to money. If the credit indeed qualifies as an 'investment' under the investment treaty, the host country has agreed to submit a dispute concerning its seizure of the credit to ICSID arbitration.

The question then arises as to whether the dispute is one falling within the jurisdiction established by the ICSID Convention: whether the term 'investment' has a content under that Convention that is independent from the definition under the investment treaty and, if so, whether such content is narrower than the treaty definition. As outlined in greater detail below, some arbitral decisions have interpreted the term 'investment' in the ICSID Convention as having an autonomous meaning that requires an expectation of gain, a certain duration and a contribution to the development of the host country. The bank credit in the example could well fail this test. A demand deposit account pays no interest; the funds are committed for no defined period of time and can be withdrawn at any moment; and the contribution of such funds to the development of the host country is difficult to quantify.

If this narrower interpretation is applied, a dispute that two Contracting States to the ICSID Convention have agreed is suitable for ICSID arbitration will be denied access to the ICSID forum. With respect to the class of disputes falling within the investment treaty's broad definition of 'investment' but outside the narrower interpretation of the term in the ICSID Convention, the investor–State arbitration provision in the investment treaty will become a pathological clause, one that envisages submitting a dispute to arbitration but fails to do so.

On the other hand, if the term 'investment' in the ICSID Convention is dependent on the definition contained in the investment treaty, the clause is not pathological and ICSID can hear the dispute that the parties have agreed to submit to it.

This chapter examines the meaning of 'investment' in the ICSID Convention and, in particular, considers the significance of that question for investment treaties that call for ICSID arbitration as the sole means of investor–State dispute resolution. In reviewing these issues, this chapter attempts a rigorous application of the Vienna Convention on the Law of Treaties of 1969 (the 'Vienna Convention', or VCLT). By so doing, it hopes to contribute meaningfully to the debate over 'investment' in the ICSID Convention, since to date many arbitral decisions and awards

addressing the topic have not applied the VCLT in as thorough a fashion as might otherwise be desired.

We first review the doctrinal debate to which recent jurisprudence has given rise, on the meaning of the term 'investment' in the ICSID Convention. This chapter then undertakes an analysis of that term using the principles set out in Arts. 31 and 32 VCLT. It begins by summarising those principles. It considers the ordinary meaning of the term 'investment', together with the object and purpose of the ICSID Convention. It examines the context of that term, notably in the preamble to the ICSID Convention and the Report of the Executive Directors of the World Bank that transmitted the ICSID Convention to Member States for their consideration. It studies whether investment treaties can be considered either a 'subsequent practice of States' regarding the interpretation of the ICSID Convention, or a 'relevant rule of international law applicable to the relations between' such States. It addresses the preparatory works for the ICSID Convention. And, finally, it considers whether investment treaties calling exclusively for ICSID arbitration may be seen as 'successive treaties relating to the same subject matter' as the ICSID Convention.

Doctrinal debate on ICSID 'investment'

Recent arbitral awards[2] have sparked a renewed and intensified debate among practitioners and scholars of investment treaty arbitration over the definition of the term 'investment' contained in the ICSID Convention.

Although Art. 25(1) of the ICSID Convention grants ICSID jurisdiction over 'any legal dispute arising directly out of an *investment*, between a Contracting State . . . and a national of another contracting State, which the parties to the dispute consent in writing to submit to the Centre', the ICSID Convention does not define the term 'investment'. This absence of a definition did not result from an oversight by the Contracting States,

[2] *Patrick Mitchell* v. *The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006 ('*Patrick Mitchell*'); *Malaysian Historical Salvors* v. *Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, 2009; *Biwater Gauff Ltd* v. *Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ('*Biwater*'); *Phoenix Action* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114 ('*Phoenix*'); *Malaysian Historical Salvors* v. *Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para. 62 ('*MHS Annulment*') *Inmaris Perestroika Sailing Maritime Services GmbH and Others* v. *Ukraine*, ICSID Case No. ARB 108/8, Decision on Jurisdiction, 8 March 2010, paras. 129–30 ('*Inmaris*').

but rather from the latter's inability to agree, despite numerous attempts, on a definition.[3] Given 'the essential requirements of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Art. 25(4))',[4] the Contracting States opted to dispense with a definition of 'investment'.

Yet this deliberate silence on the part of the drafters has engendered a heated debate as to the proper meaning of the term 'investment' in the ICSID Convention. Faced with respondent States increasingly challenging the jurisdiction of ICSID tribunals on the basis that the investor-claimant failed to make an 'investment' under the ICSID Convention, tribunals have been required to interpret and give meaning to this term so as to determine their jurisdiction to hear a dispute. Professor Walid Ben Hamida helpfully observes that two distinct theories have emerged from the practice of ICSID tribunals: the objective approach, and the subjective one.[5]

[3] Manciaux, 'La compétence matérielle', *supra* n. 1, para. 5 ('L'étude des travaux préparatoires de la Convention de Washington démontre en effet que nombre d'États souhaitaient que l'on définisse précisément la notion d'investissement et que ce n'est que faute d'accord entre les États à ce sujet qu'il fut décidé de ne pas en retenir', emphasis added); W. Ben Hamida, 'Two Nebulous ICSID Features. The Notion of Investment and the Scope of Annulment Control', *Journal of International Arbitration*, 24 (2007) 287–306, 288–9 (citing possible explanations for the absence of a definition, including that 'there was a lack of consensus over the definition of the notion of investment among the representatives of the states'); Waibel, 'Opening Pandora's Box', *supra* n. 1, 719 ('During negotiations, various attempts at defining that term failed; this lack of consensus was the primary reason for the Convention's silence on the definition of "investment"'); G. R. Delaume, 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', *International Lawyer*, 1 (1966), 64–80, 69–70 (stating that the lack of a definition was the best solution since any definition would have been too broad to serve a useful purpose while a precise formulation would have been inconvenient in that it might have arbitrarily limited the scope of the Convention); R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), 61 (stating that the *travaux préparatoires* of the Convention reveal that several attempts to define an 'investment' were made but failed).

[4] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), para. 27. See also A. Broches, 'The Convention on the Settlement of Investment Disputes. Some Observations on Jurisdiction', *Columbia Journal of Transnational Law*, 5 (1966), 263–80, 268.

[5] For a different approach, see E. Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), 403–16 (analysing the deductive method of defining an investment and the intuitive method of identifying characteristics of an investment); *Romak SA* v. *Uzbekistan*, PCA Case No. AA280, Award on Jurisdiction, 20 November 2009, para.

The objective theory posits that there is an objective and autonomous definition of investment for purposes of establishing ICSID jurisdiction.[6] The term investment has an 'independent meaning' and sets the 'outer limits' of Art. 25(1) such that any transaction falling outside the scope of these limits would not be deemed an ICSID investment (and thus would not fall within ICSID jurisdiction), irrespective of any agreement between the parties.[7] This line of cases espouses different variations of the so-called *Salini* test, which identifies five elements of an ICSID investment,[8] namely (a) a contribution of money or other assets of economic value, (b) the regular generation of profits and return, (c) a certain duration, (d) an element of risk and (e) a contribution to the host State's development.[9]

In contrast, the subjective theory considers that the term 'investment' in Art. 25(1) of the ICSID Convention does not have an autonomous meaning but rather is 'subjectively defined by the parties when framing

197 ('*Romak*') ('Certain arbitral tribunals have taken a "conceptualist" approach and have considered that there exists a definition of investment that entails certain elements which must be present in order to assert jurisdiction *ratione materiae*. Other tribunals have resorted to a more "pragmatic" approach which avoids any generalization, and considers the presence of certain elements typical of investments – even if they are not always present in every investment – to suffice for the purpose of establishing jurisdiction').

[6] Ben Hamida, 'Two Nebulous ICSID Features', *supra* n. 3, 290; Waibel, 'Opening Pandora's Box', *supra* n. 1, 722–32.

[7] Krishan, 'A Notion of ICSID Investment', *supra* n. 1, 3–4; see also N. Rubins, 'The Notion of Investment in International Investment Arbitration', in N. Horn and S. Kröll (eds.), *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects* (The Hague and Boston: Kluwer Law International, 2004), 283–324, 289 (stating that the drafters of the Convention consciously established the objective limitations of ICSID jurisdiction as distinct from the issue of consent, in part to prevent investors from using overweening bargaining power to compel small Host States to submit all disputes to ICSID jurisdiction).

[8] Although these five elements are typically referenced as the *Salini* test, it was the *Fedax* Tribunal that first examined the definition of an 'investment' for purposes of ICSID jurisdiction and discerned these five elements. *Fedax NV* v. *The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para. 43, *ILM*, 37 (1998), 1378 ('*Fedax*').

[9] *Salini Costruttori SpA and Italstrade SpA* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52, *ILM*, 42 (2003), 609 ('*Salini*'); *Joy Mining Machinery Ltd* v. *Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, paras. 49–50; *Saipem SpA* v. *Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 99; *Patrick Mitchell*, *supra* n. 2, para. 31. One Tribunal adapted and modified these five elements into six elements, namely (1) a contribution in money or other assets; (2) a certain duration; (3) an element of risk; (4) an operation made in order to develop an economic activity in the host State; (5) assets invested in accordance with the laws of the host State; and (6) assets invested *bona fide*. *Phoenix*, *supra* n. 2, para. 114.

their consent to ICSID arbitration'.[10] Notably, many investment treaties concluded in recent years contain a broad asset-based definition of investment ('any kind of asset', 'every kind of asset', or 'all assets'), thereby 'suggesting that the term embraces everything of economic value, virtually without limitation'.[11] Under the subjective theory, if States expressly agree in their investment treaty to characterise a transaction as an investment, then such agreement would govern for purposes of ICSID jurisdiction.[12] Accordingly, whether a claimant has made an 'investment' for purposes of Art. 25(1) of the ICSID Convention would be dependent on and determined by the terms of the instrument consenting to ICSID jurisdiction (here, the bilateral investment treaty).[13] The 'dependent' content of the ICSID term 'investment' is the key under this theory, and it is perhaps more accurate to describe the dialectic here as one between an 'autonomous' meaning of investment and a 'dependent' one, rather than between an 'objective' and 'subjective' reading of that term.[14]

[10] Ben Hamida, 'Two Nebulous ICSID Features', *supra* n. 3, 289.

[11] UNCTAD, *International Investment Agreements: Key Issues*, vol I, (Geneva: UNCTAD, 2004), 119. ('UNCTAD Paper'), www.unctad.org/en/docs/iteiit200410_en.pdf. For a narrow interpretation of an asset-based definition of 'investment' in an investment treaty, see *Romak SA* v. *Uzbekistan*, *supra* n. 5. The *Romak* award arrived at that result by considering the ordinary meaning of the term 'investment' in the investment treaty, even though that term had been specifically defined by the treaty parties. See paras. 174, 176–177, 180. By contrast, the UNCTAD Paper and other authorities consider that, where the term 'investment' has been defined by the parties, the relevant ordinary meaning is that of the terms used in the definition (e.g. 'every kind of asset'), and not that of the term defined by the parties (i.e. 'investment'). See also VCLT Art. 31(4).

[12] Krishan, 'A Notion of ICSID Investment', *supra* n. 1, 3. As noted by this commentator, although the parties' consent may expand or limit ICSID jurisdiction, it does not shed light on the meaning of the term 'investment' contained in Art. 25(1) of the ICSID Convention, nor on whether such meaning should be autonomous. He argues that the task of identifying an 'objective definition' of 'investment' falls to the parties of the treaty (i.e. States), not to individual tribunals sitting in cases of particular investor–State disputes (p. 5).

[13] See, e.g., *Lanco International* v. *Argentina*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998, para. 48, *ILM*, 40 (2001), 457, ICSID Case No. ARB/00/9 (2008); *Mihaly International* v. *Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, para. 55 ('*Mihaly*'); *Generation Ukraine* v. *Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 8.2; *MCI Power Group* v. *Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paras. 159–160 ('*MCI Power*'); *Inmaris*, *supra* n. 2, para. 130.

[14] The authors are grateful to Anthea Roberts for suggesting this distinction between 'autonomous' and 'dependent' interpretations.

In contrast to the subjective theory, application of the objective theory may leave an important gap in the remedy intended to be offered by an investment treaty. If the term 'investment' has an autonomous meaning under Art. 25 of the ICSID Convention that is distinct from and narrower than any such meaning ascribed by States in their investment treaties, this may create a situation where an asset would constitute an investment under an investment treaty but not under Art. 25 of the ICSID Convention. In cases where an investment treaty provides *only* for ICSID arbitration as a forum for resolving investor–State disputes, and to the extent that the objective meaning of 'investment' is narrower than the definition in an investment treaty, a potential investor-claimant may have claims against a Contracting State for breaches of an investment treaty but lack any forum in which to seek and obtain a remedy for such breaches.[15]

While an empirical study of all investment treaties containing a broad definition of 'investment' and providing exclusively for ICSID arbitration is beyond the scope of this chapter, anecdotal evidence shows that such treaties are far from rare. It is notable that a model investment treaty adopted for at least some years by each of the following States falls into this category: Burundi, France, Germany, Malaysia and the United Kingdom;[16] examples of such treaties in force include also at least some treaties for Belgium and Luxembourg, The Netherlands, France and Switzerland.[17]

[15] It is precisely this concern, *inter alia*, that recently prompted an *Ad Hoc Committee* to annul an ICSID award. *MHS Annulment*, *supra* n. 2, para. 62 ('It cannot be accepted that the Governments of Malaysia and the United Kingdom concluded a treaty providing for arbitration of disputes arising under it in respect of investments so comprehensively described, with the intention that the only arbitral recourse provided between a Contracting State and a national of another Contracting State, that of ICSID, could be rendered nugatory by a restrictive definition of a deliberately undefined term of the ICSID Convention, namely, "investment," as it is found in the provision of Article 25(1).').

[16] See prototype treaties collected in the UNCTAD International Investment Agreements Compendium, www.unctadxi.org/templates/DocSearch____780.aspx.

[17] See, e.g., Art. 11 of the Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Albania for the Mutual Encouragement and Protection of Investments, 1 February 1999; Art. 7 of the Agreement between the Government of the French Republic and the Government of the Republic of Armenia for the Mutual Encouragement and Protection of Investments, 4 November 1995; Art. 8 of the Agreement between the Government of the French Republic and the Government of the People's Republic of Bangladesh for the Mutual Encouragement and Protection of Investments, 10 September 1985; Art. 9 of the Agreement on Encouragement and

The conjunction of the broad definition of 'investment' in such treaties, their provision for exclusive ICSID Convention jurisdiction and jurisprudence espousing a narrow view of 'investment' in that Convention raises the question of whether application of the VCLT compels this lacuna in protection for the investor-claimant. Rather, could it be said that the treaty interpretation principles enunciated therein, when applied to the ICSID Convention, dictate an autonomous meaning of the term 'investment' that is broader than that delineated by the *Salini* test such that the aforementioned problem dissipates? Alternatively, could it be said that the meaning of 'investment' is dependent on the terms of operative consent to ICSID jurisdiction? Before exploring each of these questions, however, we must first address whether the VCLT applies at all to the ICSID Convention.

Applicability of the VCLT to the ICSID Convention

Art. 4 of the VCLT reflects the rule against the retroactivity of treaties and generally provides for the application of its rules only to treaties concluded after its entry into force. Because the ICSID Convention was concluded in 1965 – four years before the VCLT was adopted – the question of whether the VCLT supplies the appropriate reference point for interpreting the ICSID Convention naturally arises.

The non-retroactivity principle embodied in Art. 4, however, is '[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties between one or more States ... would be subject under international law independently of the Convention'. If the rules of interpretation of the VCLT reflect or codify customary international law, then the ICSID Convention would be subject to those rules 'independently' of the VCLT.[18]

This prohibition against retroactivity thus depends on the extent to which the relevant provisions of the VCLT are declaratory of customary law rather than representing a progressive development of the law. The International Court of Justice (ICJ) has held that the VCLT's provisions on interpretation of treaties reflect customary international

Reciprocal Protection of Investments between the Kingdom of The Netherlands and the People's Republic of Bangladesh, 1 November 1994; Art. 9(6) of the Accord entre la Confédération suisse et la République de Bolivie concernant la promotion et la protection réciproques des investissements, 6 November 1987.

[18] P. V. McDade, 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969', *ICLQ*, 35 (1986), 499–511, 500.

law.[19] The Court's view accords with those of respected commentators from the time the Vienna Convention was adopted[20] and of the United Nations International Law Commission (ILC), which prepared and proposed the text of the Draft Articles on the Law of Treaties in Chapter II of the 1966 Report of the International Law Commission ('Draft ILC Articles'), the preparatory text for the VCLT, which the Conference adopted in significant part. The ILC confirmed that it sought to 'isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties'.[21]

Accordingly, the provisions contained in Part III of the VCLT discussed in the pages that follow, namely Arts. 30–33, constitute customary international law that was codified in the VCLT and are therefore applicable to treaties concluded prior thereto, including the ICSID Convention.[22]

[19] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia–Malaysia)*, Judgment, 17 December 2002, ICJ Rep. 2002, 625, 645, para. 37 (noting that, 'in accordance with customary international law, reflected in Articles 31 and 32 of that Convention: a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all on the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion') (internal quotation omitted); ('with respect to Article 31, paragraph 3, the Court has had occasion to State that this provision also reflects customary international law').

[20] I. Sinclair, 'Vienna Conference on the Law of Treaties', *ICLQ*, 19 (1970), 47–69, 65–6 (the treaty interpretation principles set out in Arts. 31–33 VCLT, which were adopted by unanimous vote, 'faithfully reflect the preponderant opinion among jurists and practitioners on the relative value to be attached to the various elements of treaty interpretation').

[21] 'Reports of the Commission to the General Assembly', *YB Int'l L. Comm.*, 2 (1966), 187–274, 218–19 ('ILC Commentaries'). Although these ILC records 'are not technically the records of the Vienna diplomatic conference', they were referred by the United Nations General Assembly to the Conference as 'the basic proposal for consideration by the conference'. H. W. Briggs, 'The *Travaux Préparatoires* of the Vienna Convention on the Law of Treaties', *AJIL*, 65 (1971), 705–12, 711–12. Moreover, given that many of the articles of the VCLT 'are identical with those drafted by the Commission, and in most others the changes are relatively minor' – which is the case for Arts. 30–33 VCLT – 'the records of the Commission may, in particular cases, be an indispensable aid in elucidating the terms appearing in the Vienna Convention' (712).

[22] The *Ad Hoc* Committee in *MHS Annulment* reached the same conclusion when it expressly examined this question, finding that it was on 'firm ground in resorting to the customary rules on interpretation of treaties as codified in the Vienna Convention'. *MHS Annulment*, *supra* n. 2, para. 56. In contrast, although two other ICSID tribunals referenced the VCLT interpretation principles as being relevant to defining the term 'investment' in Art. 25(1) of the ICSID Convention, neither underwent the foregoing

The fact that the International Bank for Reconstruction and Development (IBRD, or World Bank) signed the ICSID Convention and assumed certain obligations thereunder gives rise to another applicability question. If the Bank were to be considered a 'party' to the ICSID Convention (a question addressed further below), the VCLT might not apply since its applicability is generally limited to treaties between States only.[23] However, the VCLT nonetheless applies to 'any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation'.[24] Since the ICSID Convention is both the constituent instrument for ICSID, an international organisation, and was adopted within the World Bank, the VCLT clearly applies to it under this article.

Interpreting the term 'investment' in Art. 25(1) ICSID Convention

The Vienna interpretation principles

The elements of interpretation in Art. 31 VCLT – namely, the ordinary meaning of the terms, the context and the object and purpose of the treaty – 'all relate to the agreement between the parties *at the time when or after it received authentic expression in the text*'.[25] The various elements are set forth in a logical progression, not a hierarchical order, and are intended to be applied as part of a 'single combined operation', consistent with the spirit of the unity of the process of interpretation.[26]

Putting aside the element of 'good faith' interpretation, which is assumed here, the 'ordinary meaning' is not only the 'normal' or 'usual' meaning of the terms,[27] but also encompasses a temporal element. The 'ordinary meaning' generally implies the meaning associated with those terms at the time of the conclusion of the treaty because other approaches

analysis on the retroactivity – and thus applicability – of the VCLT in the first place. See *Fedax*, *supra* n. 8, para. 20; *Patrick Mitchell*, *supra* n. 2, para. 25.

[23] Art. 1 VCLT ('The present Convention applies to treaties between States'); Art. 3 VCLT (noting '[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law').

[24] Art. 5 VCLT.

[25] ILC Commentaries, *supra* n. 21, 220 (emphasis in original).

[26] *Ibid.*, 219–20.

[27] M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités', *RdC*, 151 (1976), 26 (1978).

could result in a meaning not intended by the drafters.[28] Alternatively, a context specific to a treaty – for example, one that establishes an international organisation or that uses legal terms of art – can indicate an intent for a more dynamic approach to treaty interpretation: one that supports the notion that such a term or such a treaty should evolve over time to keep pace with developing norms of international law or the needs of the Member States of the organisation.[29]

The 'ordinary meaning' of treaty terms also must be discerned in light of the treaty's 'object and purpose', which are usually set out in the preamble. In the event the treaty is silent in this regard, the entire text and its context will shed light on the treaty's object and purpose.[30]

With respect to the 'context' of the terms of a treaty, Art. 31(2) sets out the various elements that form part of such context – namely, the text with its preamble and annexes, any related agreement made by all parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties to it. Thus, each treaty provision must be read in such context so as to discern its meaning.[31] To the extent that the preamble might give rise to a meaning incompatible with the provisions of the treaty, however, such meaning may not be

[28] *Ibid*., 26–7.

[29] *Ibid*., 66–7 ('[Certaines catégories de traités] peuvent *de par leur nature* se prêter à une interprétation évolutive, notamment les traités normatifs qui énoncent des règles de droit et surtout les traités de codification et de développement progressif de droit international . . . Quant aux termes qui visent des concepts juridiques, c'est encore le traité qui en fait l'usage qui détermine si ces termes désignent un concept figé, immuable ou un concept évolutif'); B. Fassbender, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective* (The Hague: Kluwer Law International, 1998), 131–2 ('A constitution, we argued, typically emancipates itself from the forces that brought it about. To use judge Alvarez' wonderful metaphor, constitutions "can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard" [*Reservations to the Genocide Convention*, Adv. Op., 1951 ICJ Reports 15, 53 (Alvarez, J., dissenting)]. Hence, an interpretation based on the original will of the parties ("static-subjective interpretation") is inappropriate. It would unduly . . . impede the solution of contemporary problems. Instead, an interpretation of a [UN] Charter provision must aim at establishing, at the time of interpretation, its objective meaning in the light of the concrete circumstances of the case in question, thus taking account of the dynamic character and inherent incompleteness of any constitution'); *Dispute Regarding Navigational and Related Matters (Costa Rica* v. *Nicaragua)*, Judgment, 13 July 2009, para. 63 (quoted and discussed *infra* n. 93 and accompanying text).

[30] Yasseen, 'L'interprétation des traités', *supra* n. 27, 57.

[31] *Ibid*., 34. See generally *ibid*., 34–6.

maintained.[32] The remaining contextual elements in the form of an agreement or instrument made by the parties must be related to the treaty and must be made at the time of its conclusion so as to be taken into account in the interpretation of the treaty.[33]

Together with the context, Art. 31(3) VCLT also looks to any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice in the application thereof, and any relevant rules of international law applicable between the parties. The subsequent practice of States in applying a treaty is particularly enlightening 'for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty'[34] and represents a means of 'authentic interpretation' of a treaty, independent of the clarity (or lack thereof) of its terms.[35] However, although such practice should be 'agreed, shared and consistent',[36] it will only be binding on those States that have engaged in such practice.[37] A State that has not engaged in, nor objected to, the practice nonetheless may be deemed to have acquiesced or silently approved such practice. In all events, the applicable rules of international law at the time of a treaty's

[32] *Ibid.*, 35. See *ADF Group, Inc.* v. *United States of America*, ICSID Case No. ARB(AF)/00/01, Award, 9 January 2003, para. 147 ('We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed ... The provision under examination must of course be scrutinized in context; but that context is constituted chiefly by the other relevant provisions of NAFTA. We do not suggest that the general objectives of NAFTA are not useful or relevant. Far from it. Those general objectives may be conceived of as partaking of the nature of lex generalis while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as lex specialis. The former may frequently cast light on a specific interpretive issue; but it is not to be regarded as overriding and superseding the latter'); cf. *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), 1996 ICJ Rep. 803, 814, 12 December 1996 (rejecting argument that the United States had breached an article of the treaty providing that 'there shall be firm and enduring peace and sincere friendship' between the parties, holding that the aforementioned article 'must be regarded as fixing an objective, in light of which the other Treaty provisions are to be interpreted and applied', but could not be the basis on which a breach of the treaty might be found).

[33] Yasseen, 'L'interprétation des traités', *supra* n. 27, 37–8. See also I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn. (Manchester University Press, 1984), 129 (stating that the agreement or instrument should be related to the treaty, concerned with the substance of the treaty and with clarifying certain concepts in the treaty or limiting its field or application, and must be equally drawn up on the occasion of the conclusion of the treaty).

[34] ILC Commentaries, *supra* n. 21, 221.

[35] Yasseen, 'L'interprétation des traités', *supra* n. 27, 49. [36] *Ibid.*, 48. [37] *Ibid.*, 52.

interpretation – which may arise from another treaty, customary international law, or general legal principles – will apply.[38]

Once the application of the interpretation principles set out in Art. 31 VCLT yields a meaning, reference may nonetheless be made to the 'preparatory work of the treaty and the circumstances of its conclusion' either to confirm such meaning or, if such meaning is 'ambiguous', 'obscure', or leads to a result that is 'manifestly absurd or unreasonable', to determine the meaning.[39] Although the probative value of preparatory works has been called into question,[40] it was nonetheless included in the treaty interpretation principles because it was recognised that, in practice, international tribunals and States have recourse to subsidiary means of interpretation, such as preparatory works, not only when the interpretation principles fail to yield a clear meaning but also to confirm such meaning, both of which are reflected in Art. 32 VCLT.[41]

Finally, Art. 33 VCLT applies to the interpretation of treaties authenticated in two or more languages. Although the plurality of texts 'may be a serious additional source of ambiguity or obscurity in the terms of the treaty', it may also facilitate the interpretation of treaties by providing a clear and convincing meaning in one language that is lacking in another language.[42] That being said, the existence of a treaty in multiple languages does not change the fact that only a single treaty exists with a single set of terms subject to the aforementioned

[38] *Ibid*., 63. [39] Art. 32 VCLT.

[40] See, e.g., ILC Commentaries, *supra* n. 21, 220 ('it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation'); Yasseen, 'L'interprétation des traités', *supra* n. 27, 85–6 ('il est à remarquer que l'obscurité du texte trouve souvent son origine dans les travaux préparatoires. D'ailleurs cette obscurité peut n'être que le résultat d'une situation qui n'a pas été clarifiée ou n'a pu être clarifiée lors des négociations ... Et puis les comptes rendus des séances d'une conférence ne reflètent pas toujours fidèlement ce qui s'est passé ... Tout cela démontre combien il est illusoire souvent de compter sur les travaux préparatoires pour apporter au texte la clarté qui lui fait défaut. La plus grande prudence s'impose donc dans le recours aux travaux préparatoires').

[41] ILC Commentaries, *supra* n. 21, 223. See also *MHS Annulment*, *supra* n. 2, para. 57 ('In any event, courts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure').

[42] ILC Commentaries, *supra* n. 21, 225.

interpretation principles.[43] In practice, the equality of the texts means that every reasonable effort should be made to find a 'common meaning for the texts before preferring one to another' and 'to ascertain the intention of the parties by recourse to the normal means of interpretation'.[44]

Applying the Vienna interpretation principles to the ICSID Convention

The application of these interpretation principles should thus lead to a meaning of the undefined term 'investment' in Art. 25(1) of the ICSID Convention.

Ordinary meaning: object and purpose

Turning to the ordinary meaning of the term 'investment' at the time that the ICSID Convention was concluded, a dictionary roughly contemporaneous with the ICSID Convention defined 'investment' in most pertinent part as follows:

> 1 a: an expenditure of money for income or profit or to purchase something of intrinsic value : capital outlay ... 2: the commitment of funds with a view to minimizing risk and safeguarding capital while earning a return – contrasted with *speculation* 3: the commitment of something other than money to a long-term interest or project.[45]

Similarly, contemporaneous dictionary definitions of the French term '*investissement*' and the Spanish term '*inversión*' in the authentic text of Art. 25(1) of the ICSID Convention in those languages are '[p]lacer des fonds./Investir des capitaux dans une entreprise' and 'hablando [de caudales] emplearlos en aplicaciones productivas'.[46] It also appears that, by the mid-twentieth century, an increasingly common form of foreign investment was in the form of equity stock in companies, particularly in the primary sector (e.g. concession agreements for natural

[43] *Ibid.* [44] *Ibid.*

[45] *Webster's Third New International Dictionary* (Springfield, MA: Webster–Merriam, 1971), vol. II, 1190 (emphasis in original).

[46] *Petit Larousse Illustré* (Paris: Librarie Larousse, 1968), 555 ('INVESTIR: Placer des fonds./Investir des capitaux dans une entreprise ... INVESTISSEMENT: Nouveau moyen de production./Placement des fonds'); *Diccionario General Ilustrado de la Lengua Española* (Barcelona: SPES, 1953) ('inversión: acción y efecto de invertir ... invertir: hablando [de caudales] emplearlos en aplicaciones productivas').

resource extraction), with the protection thereof becoming 'an increasing concern of foreign investment law'.[47]

Thus, based on dictionaries contemporary with the ICSID Convention, the ordinary meaning of 'investment' is both broad and consistent with (1) a notion of investment that 'has changed over time as the nature of international economic relations has changed' and today generally is accepted to encompass such intangible assets as intellectual property,[48] and (2) the findings of several ICSID tribunals that the absence of a definition of the term 'investment' in the ICSID Convention was intended to preserve a certain amount of flexibility as to its content and to leave it to the consent of the parties to determine the parameters thereof.[49]

The ordinary meaning of the term 'investment' must also be viewed in light of the object and purpose of the Convention. The Preamble indicates that the primary object and purpose of the Convention is to respond to 'the need for international cooperation for economic development, and the role of private international investment therein' by providing 'facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire'. Such object and purpose give the term 'investment' a dimension of international economic development and of promotion of effective dispute resolution facilities that does not necessarily emerge from dictionary definitions.[50] What

[47] UNCTAD, *International Investment Agreements*, *supra* n. 11, 116.

[48] *Ibid*. 115. See also G. R. Delaume, 'ICSID Clauses. Some Drafting Problems', *News from ICSID*, 1 (1984), 19 ('This lack of definition, which was deliberate, has enabled the Convention to accommodate both traditional types of investment in the form of capital contributions and new types of investment, including service contracts and transfers of technology').

[49] See, e.g., *Fedax*, *supra* n. 8, paras. 21–22; *Mihaly*, *supra* n. 13, para. 33 ('the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment'); *MCI Power*, *supra* n. 13, paras. 159–160; *Biwater*, *supra* n. 2, para. 316.

[50] According to Christoph Schreuer, the 'only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble's first sentence . . . This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was "prompted by the desire to strengthen the partnership between countries in the cause of economic development."' C. H. Schreuer, *The ICSID Convention. A Commentary* (Oxford University Press, 2005), 124–5. See *also* E. Schlemmer, 'Investment, Investor, Nationality and Shareholders', in P. Muchlinski, F. Ortino, and C. H. Schreuer (eds.), *The Oxford Handbook of*

constitutes economic development and effective dispute resolution in this context is likely to evolve over time and, with it, the types of investments implicated. The ICSID Convention's object and purpose thus tends to support a meaning of 'investment' that evolves over time.

The context

The context of the term 'investment' also strongly suggests a more 'dependent' meaning of the provision. The relevant context for these purposes includes the Preamble to the Convention and, as compelling arguments suggest, the Report of the Executive Directors of the World Bank.

First, the Preamble of the ICSID Convention injects a certain fluidity and flexibility into the term 'investment'. As a preliminary matter, other than in the full name of ICSID and in Art. 25(1), the term 'investment' only appears in a handful of provisions of the ICSID Convention: the first two clauses of the Preamble and Art. 1(2) establishing the purpose of the Centre, none of which provides a definition of the term. Yet, as noted above, the Preamble acknowledges the role of private international investment in international cooperation for economic development and the need for a forum for resolving investment disputes that arise from time to time. This aspect of the context suggests that the meaning of the term 'investment' should be flexible and capable of evolving with changing times and development and dispute resolution needs.

Second, the Report of the Executive Directors of the World Bank, which accompanied the ICSID Convention, strongly suggests that the meaning of 'investment' should be informed in significant part by the terms of the consent of the disputing parties to submit the dispute to ICSID arbitration. In describing Art. 25(1) of the ICSID Convention, the Report first emphasises that '[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre'.[51] On the content of the term 'investment' in Art. 25(1), the Report States as follows:

> No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the

International Investment Law (Oxford University Press, 2008), 49–88, 64–5 (stating that the only limiting factor should be the first preamble sentence of ICSID which speaks of 'the need for *international* co-operation for *economic development* and the role of *private international investment* therein', emphasis in the original).

[51] Report of the Executive Directors, para. 23.

> classes of disputes which they would or would not consider submitting to the Centre (Art. 25(4)).[52]

The Report thus suggests a conscious decision *not* to provide the term 'investment' with independent content, but to leave this element to determination by the will of the disputing parties in formulating their individual consent to submit the dispute to ICSID arbitration. An emphasis on the will of the parties also follows from the reference to the mechanism of Art. 25(4) of the ICSID Convention, through which States may indicate their intention not to submit certain classes of disputes to ICSID jurisdiction. The Report thus provides substantial evidence supporting the dependent, rather than the autonomous, definition of the term 'investment'.

The question then arises as to the status of the Report in the hierarchy of sources for treaty interpretation set out in Arts. 31 and 32 of the VCLT. We are persuaded that the Report forms part of the context under Art. 31 (2) VCLT for the reasons that follow.

As a preliminary matter, we respectfully disagree with the suggestion that the Report forms part of the *travaux préparatoires* of the ICSID Convention.[53] Because the Report was not prepared until *after* the text of the ICSID Convention was finalised, it cannot fairly be viewed as a *preparatory* work to the Convention. There was nothing left to prepare at that point. Indeed, the Report itself effectively confirms this point by describing the preparatory work that led to the adoption of the text of the Convention.[54]

In our view, the Report more naturally falls under Art. 31(2) VCLT, which provides as follows:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

[52] *Ibid*., para. 27. Our view is that the phrase 'no attempt was made to define the term "investment"' refers to the absence of a definition of the term in the ICSID Convention, not to the lack of effort by the drafters to reach (unsuccessfully) a shared definition.

[53] C. F. Amerasinghe, *Jurisdiction of International Tribunals* (The Hague: Kluwer Law International, 2002), 301 ('The Report of the Executive Directors on the [ICSID] Convention may be regarded as part of the *travaux préparatoires* to which parties to the Convention subscribe when they sign and ratify the Convention').

[54] See The Report of the Executive Directors, *supra* n. 53, para. 3.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

The Report clearly was made in connection with the conclusion of the treaty and is an instrument or an agreement related to the treaty. The more difficult question is whether it can be considered to have been made 'between all the parties' or 'by one or more parties' in this connection. While the answer is not free from doubt, in our opinion the better view is that it is.

There are essentially two theories on which such a conclusion could be based. The first is that the IBRD (the Bank) may be considered a party to the ICSID Convention, and the Report was made by the Bank and accepted by the other parties as related to the ICSID Convention. Although it is not difficult to view a document unanimously adopted by the Bank's Executive Directors as one 'made by' the Bank, the more difficult question is whether the Bank can be viewed as a 'party'.

As stated in the ultimate clause of the ICSID Convention, the Bank signed the Convention and 'indicated by its signature . . . its agreement to fulfil the functions with which it is charged under this Convention'. In addition to acting as a depository for the Convention, those functions included making available the facilities from which ICSID was to operate and making available its President to serve as the Chairman of ICSID's Administrative Council and to perform certain important tasks such as appointing arbitrators, among others.[55] As an entity that signed the Convention and obligated itself in specific respects, the Bank could be argued to be a party to the Convention.

On the other hand, while having some intuitive appeal, this contention fits with the definitional structure of neither the ICSID Convention nor the VCLT. The ICSID Convention conceives of the 'Contracting States' as its parties; clearly the Bank does not fit this category. The VCLT also defines the term 'party' in terms of States, which is hardly surprising given its scope as a convention addressing treaties between States.[56]

The second theory is that the Executive Directors, in adopting the Report, did so as representatives of the Member States of the Bank and the Report therefore either reflects an 'agreement relating to the treaty which was made between all the parties in connection with the

[55] Arts. 3, 5, 38, ICSID Convention. [56] Art. 2(1)(g) VCLT.

conclusion of the treaty' or constitutes an 'instrument' along the same lines. There is, in our view, substantial support for this proposition.

In the Bank, Member States are represented by Governors, each of whom is appointed by his or her respective Member State.[57] The Board of Governors may delegate to the Executive Directors the authority to perform a number of acts, with limited exceptions not applicable here.[58] As noted in the Report, by Resolution dated 10 September 1964, the Board of Governors requested the Executive Directors 'to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration'.[59] The Board also directed that '[t]he Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate'.[60] The Board, and the member governments represented on the Board, thus delegated to the Executive Directors of the Bank the authority to adopt the text of the ICSID Convention, and to submit that text to member governments 'with such recommendations as they shall deem appropriate'.

The process resolved by the Governors may be seen as analogous to that of a multilateral conference convened for the purpose of adopting the text of a convention for subsequent approval by States. The Executive Directors were delegated the authority to adopt the text of the ICSID Convention, within the internal framework of the Bank's procedures.[61] The Executive Directors' role resembles that of representatives of States accredited to an international conference for the purpose of adopting a proposed multilateral convention, within the framework of procedures established by the conference. The Report thus may be seen as analogous, if not equivalent, to 'the Final Act of a conference incorporating the text' of the treaty adopted at that conference, and thereby establishing that text as 'authentic and definitive' within the meaning of Art. 10 VCLT.[62] As noted above, the resolution of the Board of Governors authorised the Executive Directors not only to adopt the text of the Convention but also to forward it, with their recommendations, to Member States for consideration. The Governors therefore may be seen

[57] See Articles of Association of the Bank, Article V, sec. 2(a).
[58] See *ibid*. Article V, sec. 2(b).
[59] See The Report of the Executive Directors, *supra* n. 53, para. 1 (quoting Resolution No. 214 of 10 September 1964).
[60] *Ibid*. [61] Art. 7(2) and Art. 9(1) VCLT. [62] Art. 10 VCLT.

to have authorised the Directors to issue the Report. The Report may therefore be seen as reflecting an 'agreement relating to the treaty which was made between all parties' within the meaning of Art. 31(2)(a) VCLT, or, at a minimum, an 'instrument which was made by one or more parties ... and accepted by the other parties as an instrument related to the treaty' within the meaning of Art. 31(2)(b).[63]

This conclusion is reinforced by the similar status given to similar instruments in international law. For example, Draft Protocols to the European Convention of Human Rights are accompanied by an Explanatory Report of the Ministers' Deputies who approve the text of the draft and submit it for adoption to the Committee of Ministers. These explanatory reports are considered by both commentators and the European Court of Human Rights (ECHR) as part of the context of the treaty, and not as a secondary source for interpretation.[64]

We conclude that the Report of the Executive Directors should be considered part of the context of Art. 25(1) of the ICSID Convention, and on the same plane as the text of the Convention, including its preamble. That Report, in turn, strongly supports a dependent interpretation of the term 'investment' in Art. 25(1), in accordance with the subjective approach taken by some of the jurisprudence on that term.

Subsequent practice

As 'objective evidence' of the Contracting States' understanding of the meaning of the term 'investment', the subsequent practice of States that can be deemed 'agreed, shared and consistent' may properly be 'taken into account' in interpreting a treaty's text, under Art. 31(3)(b) VCLT.[65] Recent scholarship has highlighted the importance of subsequent practice in

[63] As the Chairman of the Drafting Committee that adopted Arts. 31–33 VCLT noted, there is no requirement that an 'agreement' within the meaning of Art. 31(2) be labelled as such or take any particular form; he mentions a United Nations General Assembly resolution adopting a treaty text as an example of such an agreement. See Yasseen, 'L'interprétation des traités', *supra* n. 27, 38–9.

[64] See Sinclair, *The Vienna Convention*, *supra* n. 33, 129; *Kozacıoğlu* v. *Turkey* ECHR, Application No. [GC], No. 2334/03, para. 32, Judgement of 19 February 2009 (including the explanatory report as an integral part in describing the relevant law applicable to the case: 'the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, adopted on 27 October 2005, and its Explanatory Report').

[65] ILC Commentaries, *supra* n. 21, 221; Yasseen, 'L'interprétation des traités', *supra* n. 27, 48. It should be noted that the application of Art. 31(3) VCLT presupposes that another treaty is compatible with the ICSID Convention; to the extent that this may not be the case, Art. 30 VCLT would then become relevant to the interpretation analysis.

international investment law.[66] While we have considered other sources of subsequent State practice in the application of the ICSID Convention as potentially relevant,[67] our view is that State practice agreeing to investment treaties providing exclusively for ICSID arbitration is the most relevant of such sources to the question under consideration.

The instruments in which States have consented to submit 'investment' disputes to ICSID jurisdiction (i.e. investment treaties) contain specific definitions of the term 'investment'. Looking across investment treaties for any particular State or, if applicable, at a model bilateral investment treaty prepared by a State,[68] a consistent definition of this term will often emerge as a reflection of a State's deliberate policy in this regard. If, in turn, a number of States were found consistently to use a similar definition of 'investment', such a definition could be said to constitute State practice for – and to be binding on – these given States.[69]

This form of State practice could be particularly enlightening and persuasive in cases where investment treaties provide only for ICSID

[66] A. Roberts, 'Rethinking the Interpretation of Investment Treaties. The Dual Role of States', *AJIL*, 104 (2010).

[67] State practice might express itself through Art. 25(4) of the ICSID Convention, pursuant to which a State may notify the Centre of certain classes of disputes that it wishes to exclude from ICSID jurisdiction. However, the manner and extent to which a State may avail itself of this mechanism offers limited insight into the content of the term 'investment' under the ICSID Convention. Indeed, although this provision clearly affords a State control over the types of disputes that it may choose to subject to ICSID jurisdiction, it remains a matter of State consent rather than one of autonomous meaning of the term 'investment'. Cf. Broches, 'The Convention', *supra* n. 4, 266, 268 ('the requirement that the dispute must have arisen out of an "investment" may be merged into the requirement of consent to jurisdiction. Presumably, the parties' agreement that a dispute is an "investment dispute" will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling'). At most, by availing itself of this provision, a State can signal the types of disputes – and, potentially investments (depending on the specific wording of the exclusion) – that it deems to fall within the scope of ICSID consent, thereby necessitating an express exclusion. To date, only seven States have availed themselves of this provision. The classes of disputes identified by these States, however, are such that no consistent State practice can be said to have emerged in this regard. See, e.g., Guatemala's exclusion of disputes arising from a compensation claim against the State for damages due to armed conflicts or civil disturbances, or Jamaica's exclusion of disputes arising directly out of an investment relating to minerals or other natural resources, see Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID, April 2008.

[68] See US Model BIT 2004 and Norwegian Model BIT 2007, both of which import a *Salini*-type test to investor–State arbitration irrespective of the forum by requiring that the asset 'have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.

[69] See Krishan, 'A Notion of ICSID Investment', *supra* n. 1, 8.

jurisdiction (as opposed to various arbitration fora in addition to ICSID). Established principles of treaty interpretation suggest that, in conferring various protections to their nationals under international law and providing for ICSID arbitration of disputes concerning those protections, States intended for the ICSID arbitration provision of such treaties to be *effective* with respect to the full range of disputes covered by the consent to ICSID jurisdiction expressed therein.[70] In other words, there is little basis for considering that such States intended for there to be a gap between the definition of 'investment' under the investment treaty and the content of that same term in the ICSID Convention, given that the Convention was chosen as the sole means for resolving investment disputes under the treaty. Such treaties can therefore fairly be viewed as reflecting a subsequent practice in the application of the ICSID Convention that evidences an agreement at least by the States Parties to such treaties that ICSID Convention jurisdiction extends to a broad range of 'investment disputes'.

As previously noted, while a comprehensive review of all investment treaties in effect is far beyond the scope of this chapter, preliminary consideration of model investment treaties elaborated by a range of States suggests that there are a substantial number of treaties in force that provide only for ICSID resolution of disputes concerning 'investments' as defined by such treaties. Notably, model treaties published by Burundi, France, Germany, Malaysia and the United Kingdom, among others, either provide only for ICSID arbitration, or provide for it as the exclusive means of resolution of investor–State disputes under the treaty in the event that the Convention has entered into force for both State Parties to the investment treaty in question.[71] Each of these models provides for a broad definition of investment, most covering 'any kind of asset'.[72] To return to the example provided at the beginning of this chapter, each of these model treaties arguably would cover a demand

[70] See *Territorial Dispute (Libya* v. *Chad)*, 1994 ICJ Rep. 6, para. 51 (collecting authorities supporting 'one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness'); *Accord Anglo-Iranian Oil Co. (UK* v. *Iran)*, 1952 ICJ Rep. 93, 105 (the principle 'that a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text . . . should in general be applied when interpreting the text of a treaty'); *Corfu Channel (UK* v. *Albania)*, 1949 ICJ Rep. 4, 24 ('It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect').

[71] See *supra* n. 16 and accompanying text.

[72] France: Art. 1 (1) *UNCTAD International Investment Agreements Compendium*, vol. III, 159; Germany: Art. 1 (1), *ibid*., vol. III, 167–8, Art. 1 (1), *ibid*., vol. VII, 297; Malaysia:

deposit account and contemplate ICSID arbitration as the means for resolving disputes concerning such an asset.

In short, the practice of States in entering into investment treaties with broad definitions of 'investment' and calling exclusively for ICSID arbitration of disputes concerning investments so defined can fairly be viewed as a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation',[73] at least with respect to the States entering into such investment treaties.

The question then remains of whether the prevalence of such investment treaties – those providing both a broad definition of 'investment' and exclusively for ICSID arbitration of disputes concerning such 'investments' – is sufficiently 'agreed, shared and consistent' to reflect a subsequent practice of *all* Contracting States to the ICSID Convention. Responding to such a question with empirical evidence (i.e. a cross-referencing of ICSID Contracting States and parties to investment treaties with such characteristics) is beyond the scope of the present chapter. However, our initial assessment is that it is indeed possible that most if not all ICSID Contracting States are also parties to investment treaties containing a broad definition of 'investment' and providing exclusively for ICSID arbitration. If this assessment is proven correct, a general 'subsequent practice' may have emerged among ICSID Contracting States that 'shall be taken into account' under Art. 31(3) VCLT.

Relevant rules of international law

Art. 31(3)(c) also requires a treaty interpreter to 'take into account . . . any relevant rules of international law applicable in the relations between the parties'. According to at least one respected commentary on the VCLT, this provision applies both to conventional obligations (such as investment treaties) as well as to obligations established under customary international law.[74] The drafting history of this provision of the VCLT leaves little doubt that it was intended to include both rules of international law existing at the time of the

Art. 1 (1), *ibid*., vol. V, 309; Burundi: Art. 1 (4), *ibid*., vol. IX, 288; United Kingdom: Art. 1 (1), *ibid*., vol. III, 185.

[73] Art. 31(3)(b) VCLT.

[74] Sinclair, *The Vienna Convention*, *supra* n. 33, 139 ('But what does this reference to "relevant rules of international law" mean? Every treaty provision must be read not only in its own context, but in the wider context of general international law, *whether conventional or customary*') (emphasis added).

conclusion of the treaty and those developed or agreed between the parties thereafter.[75]

Thus, on its face this provision of the VCLT would accept the relevance of subsequent treaty practice concerning the content of 'investment' in the ICSID Convention, such as the definitions of that term in investment treaties providing only for ICSID arbitration. However, Art. 31(3)(c) is limited to rules applicable in the relations between the parties to a treaty – presumably, its ambit is limited to rules applicable in the relations between *all* parties. For the ICSID Convention, it would appear to require that each of the 140 Contracting States be a party to at least one ICSID-only investment treaty with a broad definition for investment for this rule to come into play.[76] As noted above, it may be the case that each such Contracting State is a party to such a treaty, but such an empirical study is beyond the scope of the present chapter.

Preparatory works

Finally, as mentioned above, the *travaux préparatoires* of the ICSID Convention show that several attempts were made to define the term 'investment'. The First Draft introduced a definition of investment as 'any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years'.[77] This

[75] Commentary of draft Art. 27 §3c), *Yearbook of the ILC* (1966), vol. II, 222 ('On re-examining the provision, the Commission considered that the formula used in the 1964 text ["in the light of the general rules of international law *in force at the time of its conclusion*"] was unsatisfactory, since it covered only partially the question of the so-called intertemporal law in its application to the interpretation of treaties and might, in consequence, lead to misunderstanding. It also considered that, in any event, the relevance of rules of international law for the interpretation of treaties in any given case was *dependent on the intentions of the parties*, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties. It further considered that correct application of the temporal element would normally be indicated by *interpretation of the term in good faith*') (emphasis added).

[76] An argument could be advanced that the broad definition of 'investment' is sufficiently common that it has entered into customary international law. But *Glamis Gold* v. *United States of America* explains why it is difficult for bilateral treaty obligations to crystallise into a rule of customary international law, *Glamis Gold*. v. *United States of America*, NAFTA Award, 8 June 2009, paras. 598–618. It is even more difficult to imagine that a *definition* in a bilateral treaty which, on its own, ordinarily sets out no obligation whatsoever, could be viewed as reflecting a general and consistent practice of States followed with a sense of obligation.

[77] Schreuer, *The ICSID Convention*, *supra* n. 50, 122. Other attempts included the following proposed definitions: 'the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in

proposed definition attracted criticism, *inter alia*, as being 'unsatisfactory' by lacking in precision and for introducing a specific time element.[78] Some counterproposals 'emphasised aspects of money and profit, property rights or the host State's interest in development',[79] even seeking to introduce a quantitative limit so as to exclude investments falling below a certain level.[80] Yet, ultimately, no definition was adopted. As noted above, the Report of the Executive Directors eventually acknowledged that in the final text 'no attempt was made to define the term "investment"'.[81] The drafters of the ICSID Convention thus explicitly contemplated various definitions of the term 'investment', but deliberately chose to be silent in this regard.

In any event, in light of the various possible definitions of 'investment' proposed by the drafters, it cannot be said that the *travaux préparatoires* confirm – much less clarify – the meaning of this term.[82]

Investment treaties as successive treaties of the ICSID Convention

For the sake of completeness, we also consider here one other theory to which the definition of 'investment' contained in investment treaties calling for ICSID arbitration could be relevant – namely, that these investment treaties could be considered 'successive treaties relating to the same subject matter' within the meaning of Art. 30 VCLT.[83]

As a preliminary matter, we have little difficulty in concluding that a later investment treaty calling for ICSID arbitration can be considered a successive treaty 'relating to the same subject matter' as the ICSID Convention for purposes of Art. 30 – namely the promotion of foreign direct investments (FDI) and effective dispute resolution mechanisms. We believe such is the case for several reasons. First, a variation of the first clause of the Preamble of the ICSID Convention[84] consistently appears in the preamble of investment treaties, thereby not only echoing

any such enterprise; or (iii) financial obligations of a public or private entity other than obligations rising out of short term banking or credit facilities' (121–5).

[78] *Ibid*., 122. [79] *Ibid*. (internal references omitted). [80] *Ibid*., 123.

[81] The Report of the Executive Directors, *supra* n. 53, para. 27.

[82] Yasseen, 'L'interprétation des traités', *supra* n. 27, 85–6 ('il est à remarquer que l'obscurité du texte trouve souvent son origine dans les travaux préparatoires. D'ailleurs cette obscurité peut n'être que le résultat d'une situation qui n'a pas été clarifiée ou n'a pu être clarifiée lors des négociations').

[83] Art. 30 VCLT.

[84] 'Considering the need for international cooperation for economic development, and the role of private international investment therein'.

but also implementing and furthering the same strategic goals that motivated the drafters of the ICSID Convention.[85] Second, the terminology and types of provisions contained in investment treaties (e.g. investment, nationality of investors, consent) again echo the ICSID Convention, thereby evidencing a continuation – indeed, a succession – as between the two. Third, both investment treaties and the ICSID Convention contain provisions for a dispute resolution mechanism in investor–State disputes. Fourth, when an investment treaty calls for ICSID arbitration, it is hard to dispute that such treaty and the ICSID Convention relate to the same subject matter, namely arbitration of foreign investment disputes.

Art. 30 VCLT sets out the principles for the application of successive treaties relating to the 'same subject matter'. Specifically, when the parties to a later treaty do not include all of the parties to the earlier one, and both treaties are still in force, then as between the States that are parties to both treaties, 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. This rule is 'no more than an application of the general principle that a later expression of intention is to be presumed to prevail over an earlier one'.[86]

In most every respect, later investment treaties are entirely compatible with the ICSID Convention. Thus, the question of the application of the ICSID Convention does not arise: the provisions of the earlier and the later treaty being compatible, both continue to apply and their simultaneous application poses no particular difficulty.

In the scenario under consideration, however, a difficulty could indeed arise: the term 'investment' in Art. 25 of the ICSID Convention could have a narrow autonomous meaning, while the investment treaty could envisage ICSID arbitration for a wider range of investment disputes, such as a dispute concerning our example of the demand deposit account. What result would Art. 30 VCLT compel under such circumstances, where an incompatibility within the meaning of that article could indeed be at issue?

[85] See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Kingdom of The Netherlands and the Government of Romania, 19 April 19 1994; Agreement on the Reciprocal Encouragement and Protection of Investments between the Government of the Republic of Lebanon and the Government of the Republic of Mauritania, 15 June 2004; Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, 7 May 1991.

[86] ILC Commentaries, *supra* n. 21, 217.

Interestingly, and assuming for these purposes a narrow, autonomous definition of 'investment' in the ICSID Convention, the answer under Art. 30 VCLT appears to be different for the two State Parties to the investment treaty and the other Contracting States to the ICSID Convention. Under Art. 30(4): 'When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3', i.e. the later-in-time rule. Thus, as between the two Contracting States party to the investment treaty, the broader definition contained in that treaty would appear to apply. With respect to the demand deposit case, the version of the ICSID Convention as modified between those two States in the investment treaty would appear to provide ICSID jurisdiction and obligate those two States to respect and enforce the award as an ICSID Convention award.

With respect to other ICSID Contracting States, however, only the 'original' ICSID Convention with the assumed narrow, autonomous meaning of 'investment' would appear to apply. Under Art. 30(4)(b) VCLT, 'as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations'. Thus, imagining a scenario where an ICSID tribunal held that Art. 25(1) reflected a narrow, autonomous meaning of the term 'investment' but nonetheless retained jurisdiction under the ICSID Convention as modified by the subsequent investment treaty, other ICSID Contracting States might not be obligated to enforce the tribunal's award as an ICSID award. However, as noted above, the two State Parties to the investment treaty would be so obligated (and of course the award might remain enforceable under the New York Convention or other treaty on the recognition and enforcement of arbitral awards).

This somewhat surprising result, however, could arise only if there is an incompatibility between the definition of 'investment' in an investment treaty and the content of that undefined term in the ICSID Convention. Nonetheless, it raises a policy dimension relevant under Art. 41(1)(b) VCLT that highlights the uniqueness of the ICSID Convention.[87] If some States agree between themselves that certain assets should constitute 'investments' for purposes of ICSID jurisdiction and consent thereto – with all of the limitations on sovereignty that it may imply (e.g. 'application of international law (Art. 42), recourse against

[87] Art. 41(1) and Art. 30(5) VCLT.

awards limited to an ad hoc committee')[88] – why should they be barred from so doing? What harm to other ICSID Contracting States could result from investment treaty State Parties defining 'investment' how they wish?

Some commentators argue that, if the term 'investment' is ascribed a definition that is dependent on the will of State Parties to investment treaties and that is so broad so as to encompass any kind of economic operation, 'even those without any connection to "authentic" investment', ICSID would become 'just another arbitration institution competing with a range of others' and this would render meaningless these important limitations on sovereignty accepted by the Contracting States when signing the Convention.[89] Yet a State that might adopt such a broad definition would do so fully knowing that it was renouncing various State sovereign prerogatives.[90] Others consider that if ICSID jurisdiction were to become solely a matter of consent between States as expressed in investment treaties, this would render 'superfluous the requirement of "investment" under the convention'.[91] Yet this argument presupposes its own conclusion, i.e. that the term 'investment' in the ICSID Convention has an autonomous meaning that is at odds with any meaning that may be ascribed by the States.

From our perspective, and as noted above, the interest that Contracting States to the ICSID Convention hold in a definition of 'investment' voluntarily adopted in an investment treaty by other Contracting States is evident, if at all, in the area of enforcement. Contracting States have agreed to recognise an ICSID award as enforceable and not to subject it to any court review. That agreement, which encompasses both a commitment of national resources (to enforce the

[88] F. Yala, 'The Notion of "Investment" in ICSID Case-Law. A Drifting Jurisdictional Requirement? Some "Un-Conventional" Thoughts on Salini, SGS and Mihaly', *Journal of International Arbitration*, 22 (2005), 105–25, 125.

[89] *Ibid.*, 117 ('there are serious problems with admitting an operation within the ambit of ICSID jurisdiction simply because it falls under a category of investments protected by a BIT containing an ICSID clause').

[90] But see Manciaux, 'La compétence matérielle', *supra* n. 1, para. 9 ('Définir la notion d'investissement est donc nécessaire, et pas seulement pour des raisons académiques; abstraction faite de l'avenir du Cirdi, c'est une question de sécurité juridique pour les investisseurs étrangers et les Etats récepteurs d'investissements, . . . il semble en outre difficile de concevoir que la portée *ratione materiae* de ce traité multilatéral . . . dépende d'instruments bilatéraux comme des TBI qui ne sont à son égard que de simples textes d'application. Ce serait faire primer le texte secondaire sur le texte principal').

[91] Gaillard, '"Biwater"', *supra* n. 1.

award) and an unusual abandonment of any national control of the content of the award, arguably is limited to awards expected to fall within the ICSID Convention's grant of jurisdiction. An award reflecting a bilateral agreement on 'investment' far afield from the autonomous meaning of that term could arguably betray the expectations on which that commitment of resources and abandonment of sovereignty were based. On a more mundane level, to the extent that an expansive definition of 'investment' in investment treaties might lead to an unexpected growth in the number of cases brought before ICSID, various case management issues would likely arise for the Secretariat, as well as costs for the Contracting States as a whole, since they bear ICSID costs that are not directly covered or reimbursed by the parties, such as a portion of the costs related to ICSID counsel serving as Secretary of the Tribunal and various other costs for administrative facilities and services.[92]

However, in our view, we are not entirely convinced that these policy concerns are sufficiently pressing to impact significantly the analysis. To return again to the demand bank account scenario, we do not find it shocking to consider that the taking of a credit in such an account could give rise to ICSID jurisdiction. We also see no evidence to date of a risk to ICSID's effectiveness and success as a dispute resolution forum and mechanism resulting from such definitions of 'investment'.

Conclusion

The ICJ recently had occasion to make the following, important observation on treaty interpretation:

> there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[93]

[92] Art. 17, ICSID Convention.

[93] *Dispute Regarding Navigational and Related Matters (Costa Rica* v. *Nicaragua)*, Judgment, 13 July 2009, para. 63.

Our review above of the ICSID Convention term 'investment' through the prism of the VCLT identified a number of factors arguing for a similarly flexible and evolving approach to 'investment' in Art. 25(1):

(a) The approach of considering the content of 'investment' based primarily on the terms of the operative consent to ICSID jurisdiction in each case is the approach strongly suggested by the Report of the Executive Directors. It is our view that such Report qualifies as part of the 'context' of the provisions of the ICSID Convention under Art. 31(2) VCLT. The Report's statement is highly persuasive evidence in favour of the dependent approach to 'investment' in Art. 25(1).
(b) Other elements of the context of the term 'investment', notably the Preamble's reference to foreign private investment's role 'in international cooperation for economic development', tends to support the notion that what constitutes an 'investment' could evolve over time.
(c) Elements of an 'agreed, shared and consistent' State practice favouring a broad definition of 'investment' have emerged in the definitions of the term 'investment' in investment treaties providing only for ICSID arbitration. Similarly, those same treaties could be seen as 'relevant rules of international law applicable in the relations between the parties' within the meaning of Art. 31(3)(c) VCLT. Whether this State practice is sufficiently general and consistent to reflect a common view among ICSID Contracting States is a question for empirical study that is beyond the scope of the present chapter.

By contrast, our analysis has not found substantial support in a VCLT analysis for an autonomous definition of the term 'investment' as exemplified by the five-part *Salini* test. This is not a criticism of the autonomous approach *per se* – we consider *Salini* and its progeny to represent a logical use of inductive reasoning to arrive at a definition of 'investment'. The difficulty, however, from the viewpoint of a VCLT analysis, is that there is little to suggest that the Contracting States intended for the term 'investment' to have an autonomous definition, much less for the *Salini* test to reflect *the* definition. As noted further above, the ordinary meaning of 'investment' at the time the ICSID Convention was concluded does not accord with the autonomous approach exemplified by the *Salini* test. The context – notably in the form of the Report of the Executive Directors – is contrary to the autonomous approach: that Report states that the decision not to include a specific definition of 'investment' was

intentional and that this element was considered adequately addressed by the terms of the consent required in each individual case. The subsequent practice of ICSID Contracting States that we have considered also does not support the autonomous approach. While the *travaux préparatoires* to the ICSID Convention provide conclusive support neither for the autonomous nor the dependent approach, they do suggest that the negotiating parties considered a number of different definitions and were unable to reach agreement on any of them. *Salini*'s definition is a fine definition for what it is, but application of the VCLT does not lead to the conclusion that the term 'investment' has an autonomous definition or that such definition has a specific content.

Jan Paulsson, in a recent award in a case in which he sat as sole arbitrator, framed the issue as follows:

> Indeed in the context of BITs the notion of an autonomous investment requirement would be of a different nature than the 'legal dispute' and 'Contracting States' requirement [also stated in ICSID Art. 25(1)]. It would deny Contracting States the right to refer legal disputes to ICSID if they have defined investments too broadly. One may wonder about the purpose of such a denial. If the words of the Convention nevertheless said so that would of course be decisive. But there is no such express limitation. The drafters of the Convention decided not to define 'investments'. Does this mean that the matter is left to the determination of States?
>
> For ICSID arbitral tribunals to reject an express definition desired by two States-party to a treaty seems a step not to be taken without the certainty that the Convention compels it.[94]

For the reasons stated above, we consider that a VCLT analysis of 'investment' in the ICSID Convention does not provide such certainty.

[94] *Pantechniki SA Contractors & Engineers* v. *Albania*, ICSID Case No. ARB/07/21, Award, 30 April 2009, paras. 41–42 (para. numbers omitted) See also *Inmaris*, *supra* n. 2, para. 130.